No. 04-906

IN THE

Supreme Court of the United States

SHARON ZIMMER,

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fifth Circuit erred in affirming the District Court's grant of summary judgment against Zimmer on her disability discrimination claim based on Zimmer's failure to submit any evidence that she was replaced by or treated less favorably than non-disabled employees?

CORPORATE DISCLOSURE STATEMENT

Southwestern Bell Telephone Company, L.P. is a wholly owned subsidiary of SBC Communications Inc., a publicly traded company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	3
I. No Circuit Split Exists On The Question Presented	4
A. All Circuits Require Plaintiffs to Make a *Prima Facie* Showing of Disability Discrimination	5
B. Minor Semantic Differences in the Elements of a *Prima Facie* Case for ADA Claims Do Not Create a Circuit Split	6
C. Zimmer Would Not Have Survived Summary Judgment Under Any of the *Prima Facie* Burdens She Cites	9

Contents

	Page
II. *Desert Palace* Is Inapplicable To This Case	10
III. Zimmer's Complaints That The Fifth Circuit Incorrectly Affirmed The District Court's Factual Findings And/Or Misapplied Properly Stated Law Do Not Merit Review	12
CONCLUSION	14

TABLE OF CITED AUTHORITIES

Page

Federal Cases

Bunting v. Mellen,
124 S. Ct. 1750 (U.S. 2004) 8

Butler v. City of Prairie Vill.,
172 F.3d 736 (10th Cir. 1999) 5

Daigle v. Liberty Life Ins. Co.,
70 F.3d 394 (5th Cir. 1995) 5

DeLuca v. Wiser Indus., Inc.,
53 F.3d 793 (7th Cir. 1995) 5, 6, 9

Desert Palace, Inc., v. Costa,
539 U.S. 90 (2003) 4, 10, 11, 14

Duncan v. Washington Metro. Area Transit Auth.,
240 F.3d 1110 (D.C. Cir. 2001) 5

Ennis v. National Ass'n of Business & Educ. Radio, Inc.,
53 F.3d 55 (4th Cir. 1995) 5, 6, 7, 9

Heyman v. Queens Village Comm. for Mental Health,
198 F.3d 68 (2d Cir. 1999) 5

Hilburn v. Murata Elec. N. A., Inc.,
181 F.3d 1220 (11th Cir. 1999) 5

Cited Authorities

Page

Jacques v. Clean-up Group, Inc.,
96 F.3d 506 (1st Cir. 1996) 5

Lawrence v. National Westminster Bank,
98 F.3d 61 (3d Cir. 1996) 5

McDonnell Douglas v. Green,
411 U.S. 792 (1973) ..... *passim*

McInnis v. Alamo Cmty. Coll. Dist.,
207 F.3d 276 (5th Cir. 2000) 5, 7

Monette v. EDS Corp.,
90 F.3d 1173 (6th Cir. 1996) 5, 8, 10

Postal Service Bd. Of Governors v. Aikens,
460 U.S. 711 (1983) 11

Rachid v. Jack in the Box, Inc.,
376 F.3d 305 (5th Cir. 2004) 10-11

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133 (2000) 11

Snead v. Metropolitan Prop. & Cas. Ins. Co.,
237 F.3d 1080 (9th Cir. 2001) 5

Stanback v. Best Diversified Prods., Inc.,
180 F.3d 903 (8th Cir. 1999) 5

Texas Dep't. of Cmty. Affairs v. Burdine,
450 U.S. 248 (1981) 6

Cited Authorities

Page

Rules

Sup. Ct. R. 10 ..... 12, 13

Sup. Ct. R. 10(a) 4

INTRODUCTION

The Fifth Circuit applied the widely accepted *McDonnell Douglas*[1] framework to Petitioner Sharon J. Zimmer's claim of disability discrimination and affirmed the District Court's grant of Southwestern Bell's Motion for Summary Judgment. The Fifth Circuit held that Zimmer failed to present any evidence that she was discharged or that she was replaced by or treated less favorably than non-disabled employees. Zimmer's petition presents no circuit split of authority on an important matter, no conflict with state law, and no issue of first impression. The Fifth Circuit correctly applied the *McDonnell Douglas* burden shifting analysis when it affirmed the District Court's grant of summary judgment. Review by this Court is unnecessary and should be denied.

STATEMENT OF THE CASE

Plaintiff-Petitioner Sharon J. Zimmer ("Zimmer") worked as a directory assistance operator for Defendant-Respondent Southwestern Bell Telephone Company ("Southwestern Bell") at its McKinney, Texas facility from March 1993 to February 1, 1996, and from September 1996 to late November 1997. [R. at 137-38, 142-43].

On February 1, 1996, while being pursued by police, Zimmer suffered serious injuries in a single car accident. [R. at 149-53]. As a result of her injuries, Zimmer took paid short-term disability leave from Southwestern Bell from February until September 1996. [R. at 142-43]. Zimmer testified that upon her return to work in September 1996, she was able to perform her job as well as she did before the accident. [R. at 143, 156-59, 176-78, 212, 216-17].

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1. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

Zimmer worked without incident until Thanksgiving Day 1997. [R. at 143]. On that day, Zimmer had an altercation with another Southwestern Bell employee. [R. at 143-44, 162-65]. Because she "created an office disturbance, causing customer service to be affected," Southwestern Bell gave Zimmer a Decision Making Leave approximately one week later. [R. at 166-70]. Under Southwestern Bell's established procedure, Decision Making Leave was a one-day leave with pay to allow Zimmer to decide whether she wished to continue her employment with Southwestern Bell. [R. at 166-70].

During her one-day Decision Making Leave, Zimmer visited her psychiatrist who recommended that she take a paid short-term disability leave. Zimmer testified she experienced stress and anxiety as a result of her confrontation with the other operator and her receipt of the Decision Making Leave. [R. at 159-60, 170-73, 213, 217]. While Zimmer was on paid leave, Southwestern Bell closed its McKinney, Texas facility. [R. at 220].

Southwestern Bell offered Zimmer a position as a directory assistance operator in its downtown Dallas facility. [R. at 218-19]. Although this was the same position Zimmer had in Southwestern Bell's McKinney office, Zimmer rejected Southwestern Bell's offer. [R. at 218-19]. In December 1998 or January 1999, after Zimmer rejected Southwestern Bell's offer of employment in its Dallas office, Southwestern Bell changed Zimmer's employment status from paid disability leave to "retired" with permanent pension disability and lifetime medical and dental benefits. [R. at 145-48, 189, 191, 213-14].

After receiving a right to sue letter from the EEOC, Zimmer filed suit on April 20, 2001. [R. at 1]. On January 5, 2004, the United States District Court for the Eastern District of Texas,

Sherman Division ("District Court") granted Southwestern Bell's Motion for Summary Judgment. (Pet. App. at 6). The District Court found that Zimmer failed to produce any evidence that she: (a) was disabled as defined under the ADA; (b) was a qualified individual with a disability; (c) had suffered an adverse employment action; or (d) was replaced by or treated less favorably than non-disabled employees. (Pet. App. at 11-24). Because Zimmer failed to meet her *prima facie* burden of disability discrimination, the District Court granted Southwestern Bell's Motion for Summary Judgment. (Pet. App. at 24-25).

Zimmer appealed to the United States Court of Appeals for the Fifth Circuit. On August 31, 2004, and without oral argument, the Fifth Circuit, in a per curiam opinion, affirmed the District Court's decision based on Zimmer's failure to submit any evidence that Southwestern Bell had replaced her, or that she had been "replaced by or treated less favorably than non-disabled employees." (Pet. App. at 3).

REASONS FOR DENYING THE PETITION

Zimmer presents no issues meriting this Court's review. What Zimmer infers is a split in the circuits' application of the *McDonnell Douglas prima facie* burden to ADA claims is little more than semantics. The circuit courts uniformly have imposed an identical requirement for ADA plaintiffs: they must submit some evidence of disability discrimination before the burden shifts to employers to advance non-discriminatory reasons for the employment action taken. Beyond failing to demonstrate any split of authority among the circuits, Zimmer fails to demonstrate how she could have avoided summary judgment under *any* circuit's *prima facie* burden.

Zimmer's invitation for this Court to consider the effect of its decision in *Desert Palace, Inc., v. Costa*, 539 U.S. 90 (2003) on the *McDonnell Douglas* burden shifting analysis as applied to ADA claims is inappropriate. *Desert Palace* simply establishes that plaintiffs may submit direct or circumstantial evidence to prove discrimination. Zimmer submitted neither. Finally, Zimmer's complaints that the Fifth Circuit affirmed erroneous factual findings or misapplied properly stated rules of law do not merit this Court's review.

I. No Circuit Split Exists On The Question Presented

Zimmer insinuates that a split of authority between the courts of appeals exists because the Fifth Circuit's formulation of her *prima facie* burden under the ADA "is markedly different from that used by other circuits." (Pet. at 11). In reality, no circuit split exists. All circuits require ADA plaintiffs to establish a *prima facie* case of disability discrimination before the burden shifts to the employer to advance a non-discriminatory reason for the adverse employment action.

Minor differences in the way individual courts of appeals describe an ADA plaintiff's *prima facie* burden do not establish that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," which would merit this Court's review. Sup. Ct. R. 10(a). Moreover, Zimmer fails to identify a single circuit where she could have survived summary judgment, rendering any alleged differences between the circuit courts' *prima facie* burdens meaningless in this case. Accordingly, this Court should deny Zimmer's Petition for Writ of Certiorari.

A. All Circuits Require Plaintiffs to Make a *Prima Facie* Showing of Disability Discrimination

Every circuit requires an ADA plaintiff to submit sufficient evidence to establish a *prima facie* case that the employer engaged in disability discrimination before the burden shifts to the employer to articulate non-discriminatory reasons for the employment action taken, and the vast majority have expressly adopted the *McDonnell Douglas* framework. *See, e.g., McInnis v. Alamo Cmty. Coll. Dist.*, 207 F.3d 276, 279-80 (5th Cir. 2000); *Duncan v. Washington Metro. Area Transit Auth.*, 240 F.3d 1110, 1114 (D.C. Cir. 2001); *Snead v. Metropolitan Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1087 (9th Cir. 2001); *Heyman v. Queens Village Comm. for Mental Health*, 198 F.3d 68, 72 (2d Cir. 1999); *Hilburn v. Murata Elec. N. A., Inc.*, 181 F.3d 1220, 1226 (11th Cir. 1999); *Stanback v. Best Diversified Prods., Inc.*, 180 F.3d 903, 908 (8th Cir. 1999); *Butler v. City of Prairie Vill.*, 172 F.3d 736, 747-48 (10th Cir. 1999); *Lawrence v. National Westminster Bank*, 98 F.3d 61, 68-69 (3d Cir. 1996); *Jacques v. Clean-up Group, Inc.*, 96 F.3d 506, 511 (1st Cir. 1996); *Monette v. EDS Corp.*, 90 F.3d 1173, 1186 (6th Cir. 1996); *Daigle v. Liberty Life Ins. Co.*, 70 F.3d 394, 396 (5th Cir. 1995); *Ennis v. National Ass'n of Business & Educ. Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 1995); *DeLuca v. Wiser Indus., Inc.*, 53 F.3d 793, 797 (7th Cir. 1995).

Regardless of the way that each individual circuit court articulates an ADA plaintiff's *prima facie* burden, the plaintiff's underlying obligation to satisfy that burden is the same. As the Fourth Circuit explained, "In general terms, a plaintiff establishes a *prima facie* case by proving a set of

facts which would enable the fact-finder to conclude, in the absence of any further explanation, that it is more likely than not that the adverse action was the product of discrimination." *Ennis*, 53 F.3d at 58 (citing *Texas Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)). In this case, the Fifth Circuit required nothing more from Zimmer than is required by any other circuit—namely a *prima facie* showing that the alleged adverse action against Zimmer was the product of disability discrimination. The Fifth Circuit correctly held that Zimmer failed to satisfy that burden. (Pet. App. at 4-5).

B. Minor Semantic Differences in the Elements of a *Prima Facie* Case for ADA Claims Do Not Create a Circuit Split

Zimmer argues that the *McDonnell Douglas* formulation used by the Fifth Circuit is "substantially different" than that used by other circuits. (Pet. at 11). That assertion places unwarranted emphasis on minor word variations in the articulation of the *McDonnell Douglas prima facie* standard as it applies to disability discrimination claims.

For example, Zimmer claims that the Seventh Circuit employs a substantially different formulation of the *prima facie* standard than the formulation the Fifth Circuit uses. (Pet. at 12). The Seventh Circuit requires that an ADA plaintiff show: (1) that he was a member of a protected class; (2) that he was meeting his employer's legitimate performance expectations; (3) that his employment was terminated; and (4) the employees not in the protected class were treated more favorably. *DeLuca*, 53 F.3d at 797. The Fifth Circuit requires a showing that the ADA plaintiff:

(1) has a disability or is regarded as disabled; (2) is qualified for the job; (3) was subjected to an adverse employment action on account of the disability; and (4) was replaced by or treated less favorably than non-disabled employees. *McInnis*, 207 F.3d at 279-80.

Both circuits require that ADA plaintiffs submit evidence of disability and an ability to fulfill legitimate job requirements. Both circuits also require ADA plaintiffs to submit evidence of an adverse employment action, and that other non-disabled employees were treated more favorably. While the actual words employed to describe the standard may be different, the ultimate requirement is the same. Both the Fifth and the Seventh Circuits require that ADA plaintiffs submit some evidence that an employer has engaged in disability discrimination before shifting the burden to employers.

The difference between the Fourth Circuit's and Fifth Circuit's articulation of the standard is equally semantic. Both require a showing of disability, ability to perform the job, and an adverse employment action. The Fourth Circuit articulates its final prong as requiring evidence that the adverse employment action "occurred under circumstances that raised a legitimate inference of lawful discrimination." *Ennis*, 53 F.3d at 58. In its final prong, the Fifth Circuit requires ADA plaintiffs to submit evidence that the plaintiff was replaced by or treated less favorably than non-disabled employees. *McInnis*, 207 F.3d at 279-80. Evidence that a plaintiff was replaced by or treated less favorably than non-disabled employees (Fifth Circuit) would also be evidence that the employment action "occurred under circumstances that raised a legitimate inference of lawful discrimination" (Fourth Circuit). There is no meaningful difference in the *McDonnell Douglas* formulation used by the Fourth and Fifth Circuits for ADA claims.

The Fifth Circuit's approach is also similar to that used by the Sixth Circuit. (Pet. at 11-12). Again, the first three requirements are virtually identical. In a minor variation, the Sixth Circuit uses a five prong test rather than a four prong test. *Monette*, 90 F.3d at 1186. The final two prongs of an ADA plaintiff's *prima facie* burden in the Sixth Circuit requires the plaintiff to submit some evidence that the employer knew or should have known about plaintiff's disability and that "the position remained open while the employer sought other applicants or the disabled individual was replaced." *Monette*, 90 F.3d at 1186. The purpose of both formulations in the Fifth and Sixth Circuits is to require plaintiffs to come forward with some evidence to raise an inference of disability discrimination. This Zimmer failed to do.

While the language used in establishing the *prima facie* standard pursuant to *McDonnell Douglas* in ADA claims varies slightly among the circuits, the circuits uniformly require ADA plaintiffs to bring forth some indirect evidence that an employer has discriminated on the basis of disability before shifting the burden to the employer to articulate non-discriminatory reasons for the employment action taken. Zimmer has failed to identify any bona fide conflict among the federal circuit courts regarding an ADA plaintiff's *prima facie* burden. Review by this Court is, therefore, not appropriate. Sup. Ct. R. 10(a); *Bunting v. Mellen*, __ U.S. __, 124 S. Ct. 1750, 1751 (2004) (certiorari not appropriate when "the alleged conflict of authority is more apparent than real.").

C. Zimmer Would Not Have Survived Summary Judgment Under Any of the *Prima Facie* Burdens She Cites

The lack of any substantive difference between the various articulations of an ADA plaintiff's *prima facie* burden is further revealed by Zimmer's failure to demonstrate that she would have avoided summary judgment had she brought her case in the Fourth, Sixth, or Seventh Circuit rather than in the Fifth Circuit. This failure is fatal to Zimmer's request for review.

The Fifth Circuit specifically found that Zimmer was not replaced; instead, she was offered the same position in another office. (Pet. App. at 3.) The Fifth Circuit also found that Zimmer submitted no evidence "that others were offered jobs at more than one facility," or "that she had requested placement in a smaller city." (Pet. App. at 3). Ultimately, the Fifth Circuit affirmed the District Court's grant of summary judgment because Zimmer submitted no evidence that she was treated differently from others similarly situated or that Southwestern Bell treated her less favorably than other non-disabled employees. (Pet. App. at 4-5).

Zimmer's failure to submit evidence of less favorable treatment would have resulted in summary judgment in the Seventh Circuit as well. *DeLuca*, 53 F.3d at 797 (requiring ADA plaintiffs to submit evidence that other employees in a non-protected class were treated more favorably). Similarly, Zimmer failed to produce evidence that she suffered an adverse employment action that "occurred under circumstances that raised a legitimate inference of lawful discrimination," as required by the Fourth Circuit. *Ennis*, 53 F.3d at 58. The fact that Zimmer was not replaced, as the

Fifth Circuit found (App. Pet. at 3), is also fatal to Zimmer's claims under the analysis articulated by the Sixth Circuit. *Monette*, 90 F.3d at 1186 (requiring ADA plaintiffs to submit evidence that the position they wanted remained open while the employer sought other applicants or replaced the disabled worker).

There is no substantive difference between the circuits' articulation of an ADA plaintiff's *prima facie* burden, much less a true conflict meriting this Court's review. Whatever differences may exist are moot because Zimmer cannot show she would have survived summary judgment regardless of which articulation of her *prima facie* burden was applied.

II. *Desert Palace* Is Inapplicable To This Case

Zimmer invites this Court's review to determine the effect, if any, of *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), on the *McDonnell Douglas* burden shifting analysis as applied to ADA claims. (Pet. at 16-25). In *Desert Palace*, this Court held that a plaintiff may establish proof of an illegal motive by either direct or circumstantial evidence. *Desert Palace*, 539 U.S. at 101-02. *Desert Palace* does not help Zimmer because she failed to submit either direct or circumstantial evidence that Southwestern Bell acted based on an illegal motive. In fact, the Fifth Circuit specifically found that Southwestern Bell had never even replaced Zimmer. (Pet. App. at 3). Although interesting, the precise impact of *Desert Palace* on *McDonnell Douglas* generally, and ADA claims specifically, is of no import here.

The Fifth Circuit has held that *Desert Palace* modifies the final step of the *McDonnell Douglas* burden shifting analysis. *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312

(5th Cir. 2004). The Fifth Circuit's approach appears to be well reasoned. Nothing in *Desert Palace* would suggest that this Court intended to overrule more than thirty years of jurisprudence developed under the *McDonnell Douglas* analysis or to limit the application of that analysis to summary judgment considerations.[2] Indeed, the *prima facie* case can establish the circumstantial evidence necessary to support a mixed motive jury instruction under *Desert Palace*, as evidenced by this Court's citation to *Postal Service Bd. Of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983), and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), cases that are direct progeny of *McDonnell Douglas*. *See, Desert Palace*, 539 U.S. at 99-100. The citation to those cases suggests that the *Desert Palace* mixed motive instruction comes into play only after the plaintiff has established a *prima facie* case and the case is at the final step of the *McDonnell Douglas* analysis. Zimmer, however, never made it to the last step. The Fifth Circuit correctly held that she failed to establish a *prima facie* case of disability discrimination, *i.e.*, she produced no evidence of a discriminatory motive, circumstantial or otherwise, to shift the burden of proof to Southwestern Bell. (Pet. App. at 5). Because *Desert Palace* is not implicated to this case, the Petitioner's argument does not raise a proper basis for this Court to grant Zimmer's Petition.

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2. *Desert Palace* does not even contain a reference to *McDonnell Douglas*.

III. Zimmer's Complaints That The Fifth Circuit Incorrectly Affirmed The District Court's Factual Findings And/Or Misapplied Properly Stated Law Do Not Merit Review

In her final two issues, Zimmer asserts that if the Fifth Circuit applied the correct *prima facie* standard, then it: (i) erred in its application; and (ii) ignored direct evidence of disability discrimination. (Pet. at 26-30). Neither issue merits the Court's review.

Zimmer argues that if the Fifth Circuit applied the appropriate *prima facie* standard to Zimmer's disability discrimination claim, it erred in affirming the district court's grant of summary judgment. (Pet. at 26-28). This is nothing more than a complaint that the Fifth Circuit misapplied properly stated law, which does not merit this Court's review. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Zimmer also complains that the Fifth Circuit erred by affirming a series of the District Court's factual findings. For example, the Fifth Circuit affirmed the District Court's factual finding that Zimmer produced no evidence that she ever requested a transfer to a smaller city. (Pet. App. at 3). Pointing to her own testimony "that her doctor engaged in numerous conversations with Southwestern Bell attempting to negotiate Zimmer's return to work," Zimmer infers that her doctor requested that Southwestern Bell offer Zimmer a position at another location other than Dallas. (Pet. at 27).

However, Zimmer submitted no evidence of such a request. As the Fifth Circuit observed, Zimmer did not "produce evidence that she requested a placement in one of the smaller cities." (Pet. App. at 3). To overcome this lack of evidence, Zimmer improperly endeavors to shift her burden of proof to Southwestern Bell who she claims "made no showing to disprove that Zimmer's psychiatrist requested alternate locations," or "that change in location was not the principal focus" of discussions between the EEOC and Southwestern Bell. (Pet. at 27). The Fifth Circuit correctly rejected Zimmer's argument and noted that it was Zimmer who bore the burden of proof on this issue, not Southwestern Bell. (Pet. App. at 3-4).

Zimmer also asserts that the Fifth Circuit ignored direct evidence of discrimination. (Pet. at 28-30). The Fifth Circuit disagreed that Zimmer had submitted direct evidence of disability discrimination because it found that Southwestern Bell never replaced Zimmer as she asserts. (Pet. App. at 3). Finally, even if these factual findings could be considered erroneous (and they cannot), that error simply does not warrant this Court's review. Sup. Ct. R. 10.

CONCLUSION

There is no circuit split for the Court to consider. All ADA plaintiffs, regardless of which circuit they reside in, must submit some evidence of disability discrimination before the burden of proof shifts to the employer to articulate a non-discriminatory reason for the employment action taken. The Fifth Circuit properly held that Zimmer failed to satisfy her *prima facie* burden. Because *Desert Palace* does not apply *to this case*, this Court should not grant review to determine how that decision might apply to *other* ADA claims. Finally, Zimmer's complaints that the Fifth Circuit misapplied proper statements of the law and/or erroneously affirmed the District Court's factual findings, even if true, do not merit this Court's review. Zimmer had her day in court, and she failed to meet a well-settled evidentiary burden. Zimmer's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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